

Service Date: August 1, 1986

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of)	TRANSPORTATION DIVISION
ROBERT HAMM, Livingston, Montana,)	
for a Class C Certificate of Public)	DOCKET NO. T-8266
Convenience and Necessity.)	ORDER NO. 5712

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

William E. O'Leary, Esq., 309 Geddis, Helena, Montana 59601

FOR THE PROTESTANT:

Charles Kimball, Esq., 1600 Sherman Street, Room 665, Denver, Colorado 80203

FOR THE COMMISSION:

Opal Winebrenner, Timothy R. Baker, Staff Attorneys, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

JOHN DRISCOLL, Commissioner and Hearing Examiner

BACKGROUND

On or about September 24, 1984, the Commission received an application from Robert Hamm, Livingston, Montana, for a Certificate of Public Convenience and Necessity, Class C, authorizing the transportation of Burlington Northern train crews and their baggage (1) between Livingston, Montana and Laurel, Montana via Interstate 90 and return; (2) between Livingston, Montana and Butte, Montana, via Interstate 90 and return; and (3) between Livingston, Montana and Helena, Montana via Interstate 90 and U.S. No. 287 and return.

On or about December 3, 1984, the Applicant, through counsel, waived the application of the 180 day time period contained in Section 69-12-323, MCA.

The Applicant also filed an application for Temporary Operating Authority covering the same commodities and routes contained in the permanent application. On March 25, 1985, this application for temporary authority was denied by the Commission.

After publication of the permanent application, the Commission received a protest from Pixley Transportation, Inc., an authorized carrier. A notice of public hearing was issued under a service date of February 26, 1985. Pursuant to that notice, a hearing was conducted on March 20, 1985, in the Community Room, City-County Hall, 414 East Callendar, Livingston, Montana.

Upon conclusion of the hearing, the parties agreed to have the Commission waive the issuance of a proposed order, thus allowing the hearings examiner to issue a final order under the Commission's procedural rules.

FINDINGS OF FACT

Testimony of the Applicant:

The Applicant, Robert Hamm, d/b/a Livingston Taxi Service, Livingston, Montana, appeared and testified in support of the application. Mr. Hamm sponsored the following exhibits:

Applicant's Exhibit No. 1: Letter dated April 3, 1984, from Livingston Taxi Service to Burlington Northern Railroad Co., quoting rates for the cities covered by the application.

Applicant's Exhibit Nos. 2, 3, 4: Various letters from D.C. Davis, trainmaster for Burlington Northern at Livingston, Montana, expressing support for the Applicant's proposed operation.

The Applicant testified that he has operated a taxi service in Livingston under Commission authority since January, 1982. The scope of that authority involves operations from Livingston, and within a 50-mile radius of Livingston. For several years under this authority, the Applicant attempted to operate a 24 hour taxi service, but was unsuccessful. The Applicant described operations under its existing authority as not self-supporting. The Applicant testified that he was supplementing the taxi operations with a small parcel delivery service in Livingston. The Applicant's equipment consists of one 1979 Mercury four-door sedan. The Applicant has maintained the minimum insurance coverage required by the Commission.

The Applicant also described the nature of the proposed operations. The Applicant proposes to haul Burlington Northern (BN) train crews, usually of four personnel, from Livingston to either Laurel, Helena, or Butte, and return. This service would be offered seven days a week, 24 hours a day, as determined by BN's needs and schedules. The operations would be based out of Livingston. The Applicant testified that if the Commission granted his application, he would either

purchase or lease an eight passenger van, to provide the proposed service. The Applicant had already taken steps toward obtaining such a vehicle, and could be in operation within a few days of favorable Commission action. The decision to lease or purchase would depend upon the current prices and interest rates. Use of the van would essentially be reserved for meeting BN's needs, but on occasion, it would be used for the taxi service. This did not appear to create any serious conflict.

According to the Applicant, Commission approval of its proposed operation would enhance the viability of its existing services. The Applicant would renew its 24 hour taxi service, in conjunction with the hauling of train crews. In addition, the Applicant would hire additional drivers on a commission basis.

On cross, the Applicant elaborated upon the circumstances under which it obtained its existing authority from the Commission, which specifically prohibits the transportation of BN train crews. This prohibition was placed upon the Applicant's authority at the request of the Protestant in this proceeding, Pixley Transportation, Inc. (hereafter Pixley). In return, Pixley agreed not to protest the application for taxi service.

The Applicant also admitted that on a few prior occasions, it had provided transportation services for BN. However, it was apparent that these services were rendered unintentionally. On one occasion, the Applicant provided service for a BN train crew, without knowing they were BN employees. In at least one other instance, an employee of the Applicant, in ignorance of the prohibitions, transported BN train crews. At no time has the Applicant actively solicited BN's business.

Testimony of the Shipper Witness:

Mr. Donald C. Davis, Livingston, Montana, appeared and testified as a shipper witness. Mr. Davis is the trainmaster for the Burlington Northern Railroad Co., Livingston District. As the trainmaster, Mr. Davis' duties include obtaining transportation of train crews in the area between Laurel and Helena.

Mr. Davis described the procedure by which he obtains transportation for train crews. Notification is received from the chief dispatcher's office in Billings, describing the need for such transportation. Mr. Davis then proceeds to arrange for this transportation. Because of union agreements that are in place, the primary means of providing this transportation is via the use of railroad clerks. Clerks provide approximately 70 percent of this transportation. When clerks are not available, Mr. Davis resorts to the use of local bus service. This method is used for approximately 25 percent of the transportation. For the remaining 5 percent, the services of the Protestant have been used in many instances, primarily when it is timely to do so. In some instances, Mr. Davis or another employee provide the needed transportation.

According to Mr. Davis, in a limited number of instances, time is an important factor in securing transportation for train crews. Under the FRA hours of service, train crews are allowed to work 12 hours in any 24 hour period. Often, this requirement can require that train crews cease operations during a trip. Timely transportation services are then required to provide a replacement crew. Since the Protestant's equipment is based in Laurel, Montana, advance notice is often required to arrange for use of their services. However, because of the FRA requirements, as described above, such advance notice is not always possible. This need for transportation does arise within the service area sought by the Applicant in this proceeding. It is possible that the Applicant's services might be used once or twice a week, if the authority is granted by the Commission.

Mr. Davis also related one instance in which the services of the Protestant were required, but were unavailable. On this occasion, Mr. Davis contacted the chief dispatcher in Billings and informed him of his need for transportation. The chief dispatcher apparently contacted the Protestant, who was unable to respond because their equipment was being used at another location.

Mr. Davis generally stated that it would be beneficial to have transportation services located in Livingston, to handle the need for the transportation of train crews, when that need arises within two hours or less, because of unforeseen and unplanned events. Quite often this need however, is filled by BN personnel, although Mr. Davis did state he would utilize the services of the Applicant, if available.

On cross-examination, Mr. Davis stated that he was appearing as a representative of the railroad. He stated that as such a representative, he was not appearing in support of the application, but instead was testifying as to a need for services. Mr. Davis unequivocally stated that he was not appearing on behalf of the railroad to support either the Applicant or the Protestant.

On further cross, Mr. Davis also stated that if the Protestant were to station vans in Livingston, his need to utilize the Applicant's services would be eliminated. He also testified that the bulk of the transportation services not handled by BN clerks or bus line has been provided by the Protestant. Mr. Davis also testified that the one instance described by him wherein the Protestant's services were not available when needed was the only such occasion of which he had knowledge. Mr. Davis further stated that according to his understanding, BN would not enter into a contract for services with the Applicant, although Mr. Davis admitted that he would not be involved with any

such negotiations between the Applicant and BN. He also testified that the Protestant provides good service in terms of its drivers and the quality of its equipment, as well as dependability.

Testimony of the Protestant:

Mr. Mike Pixley, Sheridan, Wyoming, appeared and testified on behalf of the Protestant, Pixley Transportation, Inc. Mr. Pixley is the vice president of the company. In general, his duties in that capacity include managing Pixley's operations based in Sheridan, as well as supervising all of the other service points on the Pixley system. According to Mr. Pixley, Pixley Transportation services only Burlington Northern, providing transportation for train crews from outlying points of different towns and several different towns. Pixley equipment and personnel are stationed or based in the following locations; Sheridan and Gillette, Wyoming, Forsyth, Glendive, Glasgow, Havre, and Laurel, Montana, and Dickinson, North Dakota. Mr. Pixley also sponsored the following exhibit:

Protestant's Exhibit A: PSC No. 4819 authorizing Protestant's operations within the state of Montana, Class C.

Mr. Pixley testified that Pixley Transportation operates twenty-eight (28) vehicles, comprised of 16 twelve-passenger vans, and 12 eight-passenger vans. There are seven vans stationed in Sheridan, Wyoming, eight in Forsyth, Montana, one in Glendive, Montana, two in Dickinson, North Dakota, three in Glasgow, Montana, four in Havre, Montana, and one in Laurel, Montana.

Mr. Pixley also testified that if BN requested Pixley Transportation, Inc. to station equipment and personnel in Livingston, they would do so. Mr. Pixley stated that in the past, Pixley

Transportation has been asked by BN to put equipment in Livingston, but this request was later withdrawn. This has happened on several occasions. BN has always determined that they did not need the services of Pixley Transportation in Livingston. Mr. Pixley stated that Pixley Transportation does have extra equipment available to meet BN's needs in Livingston.

Mr. Pixley also responded to the testimony of Mr. Davis regarding the specific instance wherein the services of Pixley Transportation were needed, but were not readily available. Mr. Pixley stated that because of that incident, as well as similar incidents (where transportation was needed in Greybill, Wyoming, but the van from Laurel was in Livingston), Pixley Transportation offered to station equipment in Livingston. This offer was refused by BN, primarily on the basis of a lack of consistent need. Mr. Pixley did not know the destination of the train crew in the incident described by Mr. Davis.

Mr. Pixley described the procedure wherein Pixley Transportation stations transportation equipment and personnel for BN. For each such location, Pixley and BN enter into a contract, which describes the authorized area of operation, typically a 300 mile radius. The contract with BN regarding the Laurel station encompasses the three points involved in this application, including service between all of the three combinations of such points. BN utilizes the services of Pixley Transportation on traffic within the scope of this application. In the four months preceding the hearing, BN utilized the services of the Protestant in connection with transportation to or from Livingston approximately 25 times. Each such contract with BN sets forth the terms and conditions of service as well as compensation. BN requires that a written agreement to be entered into before transportation services are provided by Pixley.

Mr. Pixley testified that the traffic in and out of Livingston involved both single and double crews, up to nine (9) persons. The Applicant's eight-passenger van would be insufficient to carry double train crews, since the rated capacity of the van includes the driver.

According to Mr. Pixley, the Protestants are well prepared to meet any of BN's needs, and have done so for eight years with very few complaints. If BN were to decide that there was a need for the Protestant to base equipment in Livingston, they would do so. This would not necessarily require a new contract, since Livingston is currently covered by the Laurel contract. Mr. Pixley testified that the various contracts with BN did not contain any minimum guarantee of trips or mileage. He stated that in the past, one contract for Missoula had contained such a guarantee, but the minimum was always below the actual mileage. The Missoula contract only lasted two months. Mr. Pixley testified that the van located in Laurel also services Greybill, Wyoming, but preference is given to Livingston.

On cross, Mr. Pixley stated that the Protestant would probably experience a profit on its Montana operations in 1984. Approximately 50-60 percent of the revenue under the Laurel contract is generated from transportation services provided to or from Livingston. According to Mr. Pixley, a vehicle must travel approximately 2,000 miles per month to break even on its expenses of operation. The Protestant's van based in Laurel runs approximately 2,000-2,500 miles every two weeks in service provided to or from Livingston.

Mr. Pixley admitted that if the Laurel van were needed in Livingston but were on a run to Greybill, it would take in excess of four hours to become available in Livingston. Travel time for the Laurel van to Livingston is approximately 1 hour 55 minutes.

COMMISSION ANALYSIS AND DECISION

The Commission must consider several elements in judging an application for a Certificate of Public Convenience and Necessity. The threshold determination to be made is that of the Applicant's fitness, i.e., whether or not it is a suitable carrier to operate in Montana. In examining this element, the Commission chooses to view all aspects of a carrier's fitness together; these include financial fitness, intent to serve, experience and availability of equipment, as well as the nature and extent of any past illegal operations. The Applicant's prior operations in transporting BN crews were clearly conducted in good faith. From the testimony presented at the hearing, it would appear that the Applicant's existing operations are financially sound. Although the Applicant admitted that its taxi service is not self-supporting, financial fitness is not the only factor to be considered. The Applicant expressed a sincere intent to serve, has several years of experience in providing transportation services, and has made arrangements to secure the equipment necessary to meet the requirements of the application. There is ample evidence in the record to support a finding of fitness and ability. The Commission specifically finds that the Applicant is fit and able to undertake operations pursuant to the authority applied for.

The next question is whether or not public convenience and necessity require that we grant the requested authority. Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and

continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

The questions to be considered in determining public convenience and necessity, implicit in the statute, were best stated in the case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

The first consideration in determining public convenience and necessity, then, is consideration of shipper needs (ie, whether there is a public demand or need). In this case, one shipper witness testified before the Commission.

There was a great deal of concern over the position of the shipper in regards to the application. Mr. Davis testified that BN was essentially neutral, and that his appearance was to provide the Commission with the existing facts. Suffice it to say that if the record established shipper need for the Applicant's services, the authority would be granted (regardless of BN's "official" position in this matter).

According to Mr. Davis, the need for additional transportation services by BN for its train crews relates to approximately five percent (5%) or less of the total number of train crews transported to or from Livingston. Much of this need is met by the Protestant. Of the remaining need for transportation services, a limited number of these instances have a time constraint, which

precludes using the Protestant's services. Mr. Davis also testified to one incident wherein the services of the Protestant were called upon, but were unavailable. Mr. Davis testified that he did not have any involvement with, or knowledge of, the contracts between the Protestant and BN.

However, Mr. Pixley testified that on several occasions, the Protestant has offered to station equipment and personnel in Livingston to meet any transportation needs BN may have for its train crews. These offers have been turned down by BN. On other occasions, BN has requested the Applicant to station equipment in Livingston, but has subsequently withdrawn those requests. According to Mr. Pixley, a contract with BN would not be required by the Protestant for it to station equipment in Livingston. Even if a contract were required, there are no minimum transportation requirements to be met by BN under the standard contract.

Clearly, in regard to the first step in the analysis, the Applicant has failed to meet its burden. Based upon the record in this proceeding, the Commission cannot say that a public demand or need has been demonstrated. The Protestant has clearly made itself available to meet any and all transportation needs of BN to or from Livingston. Yet there has not been a sufficient need for BN to request that the Protestant provide additional services, although it has offered to do so on many occasions (at no additional cost to BN). In summary, the Applicant has failed to meet the first requirement of the Pan-American test and has not satisfied the requirements of Section 69-12-323(2), MCA. Therefore, the application must be denied.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. That, as to the commodities at issue, there is not a public demand and need for the transportation of the same.

4. After hearing upon the application, the Commission concludes from the evidence that public convenience and necessity does not require the authorization of the proposed service.

ORDER

THEREFORE IT IS ORDERED that the Application in Docket No. T-8266 is DENIED.

Done and Dated this 1st day of August, 1986 by a vote of

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Trenna Scofield
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.